IN THE

Supreme Court of the United States

October Term, 1977

Case No. 77-195

WILLIAM TARASI, GEORGE SAMPAS and
VIRGINIA R. HARRIGAN,
Petitioners,

vs.

PITTSBURGH NATIONAL BANK and
S. ROBERT MIALKI,
Respondents.

BRIEF FOR RESPONDENTS PITTSBURGH NATIONAL BANK AND S. ROBERT MIALKI IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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A

OPINIONS BELOW

The Petition for a Writ of Certiorari presently before the Court properly sets forth the opinions below. As used in this brief, the symbol "a" will refer to the Appendix attached to the Petition for Certiorari, which Respondents adopt in full.

B

GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

The Petition adequately sets forth the jurisdictional requisites.

C

QUESTIONS PRESENTED

WHETHER CONSIDERATIONS OF POLICY WHICH GOVERN SUPREME COURT REVIEW ARE PRESENT IN THE INSTANT PETITION FOR CERTIORARI.

A. WHETHER THE COURT OF APPEALS APPLIED PROPER STANDARDS IN UTILIZING THE DEFENSE OF *IN PARI DELICTO* AS A MATTER OF LAW.

B. WHETHER THERE EXISTS ANY SUBSTANTIAL CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL MILITATING IN FAVOR OF REVIEW.

C. WHETHER THE PETITION FOR CERTIORARI PRESENTS ISSUES OF SIGNIFICANT IMPORT TO WARRANT SUPREME COURT REVIEW.

D

STATEMENT OF THE CASE

For purposes of this Brief in Opposition to the Petition for Writ of Certiorari, Respondents adopt en toto the statement of facts as set forth in the opinion of The United States Court of Appeals for the Third Circuit. (1a-32a). However, Respondents must add the following matters in order to clarify certain statements made in the "Statement of the Case" contained in the Petition for Certiorari.

(a) The "dispute between the parties" and the "discrepancy" referred to by the Petitioners at Page 7 of their Petition relate to disputes and discrepancies in the testimony regarding whether or not Respondent Mialki did in fact make certain statements, representations or warranties with respect to the Meridian and Paragon stock. As noted by the Court of Appeals and the District Court, however, there was

no disagreement as to the factual matters which bear on the defense of *in pari delicto*. (11a). It is undisputed in the record that none of the Petitioners made any disclosure of the inside information which they claimed they possessed.

(b) Petitioners refer to the Opinion and Judgment of the Court of Appeals as having been entered by "a two-person court (Judge Kalodner having died in the time period between the argument and the disposition of the case)." (Petition, p-11).

This is an inaccurate statement of the facts.

As noted in the Judgment of The United States Court of Appeals for the Third Circuit (1a), Judge Kalodner participated in the argument and in the conference on the Appeal, but died before filing of the Opinion. Thus, the three-judge panel participated in the oral argument and in the conference which followed, at which time a vote is taken with respect to the decision and Judgment of the Court. Judge Kalodner participated in both the argument and the conference in which the decision with regard to the Judgment was made. Counsel for the Respondents is advised by the Circuit Executive that, had Judge Kalodner died prior to the conference, Counsel would have been contacted as to whether they would be agreeable to accepting the decision, Judgment and Opinion of a two-judge Court. Such was not the case here, however, since Judge Kalodner did in fact participate in the argument and in the decision. At the conference, Judge Adams was appointed to write the Opinion for the panel, and while Judge Kalodner did not participate in the final Opinion as adopted, he did participate in all necessary steps to render a unanimous judgment.

Thus the reference that "Judge Kalodner having died in the time period between the argument and the disposition of the case" is inaccurate. The disposition was made by a three-judge panel.

(c) Petitioners complain that they were hampered in their preparation for litigation by protective Orders entered by Senior District Judge Joseph P. Willson, which, Petitioners allege, in some instances were entered without a hearing or never signed or docketed. While in only one instance an Order was entered without the knowledge of counsel for any of the parties, Petitioners' requested information was at a later hearing, directed by Judge Willson from the Bench to be disclosed to Petitioners, which information formed the basis for allegations raised by Petitioners to support their claims both before the District Court and the Court of Appeals.

At another scheduled hearing on a Motion for a protective Order, Petitioners' Counsel failed to appear, and being uninformed as to the reasons why Counsel was absent, the Court directed Counsel for the Respondents to proceed. After hearing, the Court then entered its protective Order.

Petitioners raised these same objections before the lower Courts. In fact, extensive discovery was conducted by Petitioners. Depositions of Respondent Mialki and six independent third parties were taken. Respondent Pittsburgh National Bank (PNB) produced substantial financial documents and responded in full to Petitioners' Request for Admissions.

Certainly the scope and conduct of discovery procedures are within the sound discretion of the trial Court, [*Borden Co. v. Sylk*, 410 F.2d 843 (3rd Cir. 1969)], and Respondents point to these facts only to obviate any intimation or allegation that Petitioners were denied a fair hearing.

The findings of the District Court and the Opinion of the Court of Appeals for the Third Circuit are set forth in the Appendix to the Petition and no further comment is believed necessary with respect thereto.

REASONS FOR DENYING THE WRIT

The policy considerations which govern Supreme Court review are not present with respect to the Petition for Certiorari presently before the Court and accordingly, the Petition should be denied.

The Petitioners' request for the Writ of Certiorari to review the decision of The United States Court of Appeals for the Third Circuit, which decision was based upon sound and established judicial reasoning and principles, does not present important issues of federal law, does not involve serious conflicts among the Circuit Courts, and is not of major public concern. It is respectfully submitted that the Petition for Certiorari should be denied.

A. Whether the Court of Appeals Applied Proper Standards in Utilizing the Defense of in Pari Delicto as a Matter of Law.

The hallmark of a tippee's liability lies in his active, voluntary participation in unlawful conduct. No economic duress is involved, nor is unequal bargaining power a consideration. Rather, joint participation in wrongdoing—voluntary illegal conduct on the part of the tippee, is the test upon which Petitioners' conduct must be measured. (25a). See *Keuhnert v. Telstar Corp.*, 412 F.2d 700 (5th Cir. 1969).

The relatively few cases dealing with tippee liability, all of which are thoroughly reviewed in the Opinion of the Court of Appeals below, are thus clearly distinguishable from cases involving the *in pari delicto* defense in other contexts (18a, ftn. 32), which do not involve these elements of *knowing*, *voluntary* participation in illegal conduct.

It is, of course, recognized that one element which is taken into account in determining the applicability of *in pari delicto* in a securities case is the impact upon the enforcement of the regulatory scheme; i.e., the public

interest. As noted by the Court of Appeals in discussing *Nathanson v. Weis, Voisin, Cannon, Inc.*, 325 F. Supp. 50, 57-58 (S.D.N.Y. 1971) (27a-28a), to bar the *in pari delicto* defense would, to some degree, diminish the problem of tippor-tippee violations by discouraging the issuance of the tip. But the Petition for Certiorari over-looks the basic point made by the Court of Appeals—that this entire issue must be viewed in the light of this Court's recent decision in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), that *scienter* must be present in order to hold a tippor privately liable in a Rule 10(b)5 case. The *scienter* which this Court defined in *Ernst & Ernst v. Hochfelder* involves the intent to deceive, manipulate and defraud, and connotes intentional or willful conduct designed to deceive or defraud investors.

As recognized by the Court of Appeals (29a) a tippor may honestly believe the tip to be true and thus, have no intent to deceive or defraud *anyone*. How, then, would the disallowance of the *in pari delicto* defense stop these tippors who do *not* act with *scienter* from releasing inside information, since they would not be liable to their tippees in any event? "Thus, 'tippee' suits would not appear to provide a particularly effective tool with which to abate the flow of inside information." (29a).

Contrast the *scienter* of the "tippee" with that of the "tippor". *By definition*, a tippee acts with *scienter*. He *intends* to deceive his buyer or seller. He intends *not* to reveal the inside tip. He *intends* to manipulate the value of the stock he is buying or selling by not revealing the inside information to the public and this maintaining the high or low price as the case may be. He *intends* to defraud the public and *acts voluntarily* to make a "killing" on the market, at the public's expense.

Both of the lower Courts, based on the Petitioners' own testimony, found that the Petitioners voluntarily and

willfully committed illegal acts in failing to make full disclosure of inside information before engaging in transactions on the open market, or refraining from trading until the information was made public. (23a, 26a). They thus possessed the degree of *scienter* required by this Court in *Ernst & Ernst v. Hochfelder, (supra)*, to be in violation of the Securities laws.

Rather than overlook the requirements of *scienter*, as charged by the Petitioners in the Petition of Certiorari, (Petition, p. 14), the Court of Appeals *specifically* considered it and applied it to distinguish *Nathanson v. Weis, Voisin, Cannon, Inc., (supra)*, and to show that the disallowance of *in pari delicto* as a defense would not materially affect the flow of inside information.

On the other hand, to allow the defense, as here, and bar tippee suits against tippors, would prevent the tippee, acting with *scienter*, from possessing a "warranty of the accuracy of the tip," (30a) and thus have no incentive at all to forbear from using inside information. The public interest, and considerations of enforcement, are thus better served by allowing the defense.

Proper standards were utilized by the Court of Appeals in the decision below, and the Court properly analyzed, interpreted and applied all relevant authorities, including prior decisions of the Court. The integrity of the Courts demands that wrong-doers should not profit from their own misdeeds.

B. Whether There Exists Any Substantial Conflict Among the Circuit Courts of Appeal Militating in Favor of Review.

Petitioners attempt to base their request for Certiorari on a "split" in lower courts on the conduct necessary to place them *in pari delicto*. However, all of the Courts of Appeal,

including the lower Court here, agree that substantially equal fault is required. (12a).

The only reported case which differs from the result reached below, however, in the tippor-tippee factual context, is *Nathanson v. Weis, Voisin, Cannon, Inc.*, 325 F. Supp. 50 (S.D.N.Y. 1971). There, as noted by the Court of Appeals (26a, 27a), the Court seemed to suggest that since tippors are the "fountainhead" of inside information, the fault of tippors and tippees cannot be said to be equal. However, this factor is *not* controlling since "the focus in our view should be a narrower one, concentrating on the extent to which the acts of plaintiffs and defendants can be said to be substantial causes of the injury suffered by the plaintiffs." (27a).

Additionally, the *Nathanson* case must now be viewed in the light of the *scienter* requirements set forth in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976).

There is no conflict among the Circuits on the issues raised in the Petition which would warrant the extraordinary granting of Certiorari in this case.

C. Whether the Petition for Certiorari Presents Issues of Significant Import to Warrant Supreme Court Review.

> And enforcement of the securities laws against putative 'tippers' by means of private suits will not be impaired to any great extent since suits by 'tippees' are relatively infrequent, especially when compared to the volume of rule 10b-5 suits brought by other classes of plaintiffs. (30a).

In the course of its Opinion, the Court of Appeals reviewed all of the cases directly bearing upon the *in pari delicto* defense in the context of tippor-tippee liability. They are relatively few. Although Congress engrafted treble

damage private actions in the anti-trust field, the private damage action in the securities field is judicially created.

This Court has clearly stated its intent *not* to further extend the judicially imposed private damage action in the securities area to mere negligent conduct. To disallow the *in pari delicto* defense would result in "the inexorable broadening of the class of plaintiffs who may sue in this area of the law [which] will ultimately result in more harm than good." *Blue Chip Stamps*, 421 U.S. at 747-748.

CONCLUSION

The Petition for Writ of Certiorari should be denied. The facts indicating clear, voluntary and willful illegal conduct on the part of Petitioners do not satisfy any jurisdictional or policy consideration justifying review by this Court. After an exhaustive review of the facts and the law, The United States Court of Appeals for the Third Circuit decided that the defense of *in pari delicto* was applicable here, that enforcement of the securities laws would be enhanced by this holding, that the ruling is consistent with the authorities, including the latest pronouncement of this Court in the securities private damage cases, and that the integrity of the Courts must be preserved.

The issues raised in the Petition do not warrant Supreme Court review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true copies of the Brief in Opposition to the Petition for Writ of Certiorari has been mailed this day of October, 1977 to: Louis M. Tarasi, Jr., Conte, Courtney and Tarasi, attorneys for Petitioners, 1825 Grant Building, Pittsburgh, Pennsylvania 15219, in accordance with Rule 33 of this Court.

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